

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISAAC IZELL BRAODEN,

Defendant-Appellant.

UNPUBLISHED

March 13, 2014

No. 313815

Wayne Circuit Court

LC No. 12-003821-FH

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his convictions, following a bench trial, of felonious assault, MCL 750.82, and domestic violence, MCL 750.812. Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to 24 to 96 months' imprisonment for the felonious assault and 93 days for the domestic violence. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The victim is defendant's former girlfriend. At the time of the assault, the two were still living together even though their relationship had recently ended. The assault began after defendant returned home to find the victim with a male friend. The victim testified that she had asked her friend to bring her some muscle relaxants because she was experiencing a lot of pain. Defendant got angry and repeatedly struck defendant both inside and outside the home with his fists and a flashlight. He also bit her lip. The circumstances of the assault will be considered in greater depth below.

II. OFFENSE VARIABLE 7

Defendant first argues that the trial court erred in assessing offense variable (OV) 7 at 50 points. Legal questions, like the interpretation and application of the sentencing guidelines, are reviewed de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, a trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). This Court must affirm the defendant's sentence absent an error in scoring. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

MCL 777.37(1)(a) indicates that OV 7 is to be scored at 50 points when “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” “As used in this section, ‘sadism’ means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3). Torture has been defined as “inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty.” *People v Glenn*, 295 Mich App 529, 533; 295 NW2d 529 (2012), rev’d on other grounds by *Hardy*, 494 Mich 430. Excessive brutality has been defined as “savagery or cruelty beyond even the ‘usual’ brutality of a crime. *Id.*”

The trial court rejected defendant’s challenge to the scoring of OV 7, saying, “The man clobbered her multiple times with a flashlight, didn’t he? Didn’t he.” We agree with the trial court that a score of 50 points was warranted. Even assuming, as is arguable, that defendant’s behavior is not of a type that would qualify as “sadism,” “torture” or “excessive brutality,” it was designed to substantially increase the victim’s fear and anxiety during the offense. “All . . . crimes against a person involve the infliction of a certain amount of fear and anxiety.” *Hardy*, 494 Mich at 442 (internal quotation marks and citation omitted; alteration by *Hardy* Court). Therefore, a court’s task is to determine what the baseline of fear and anxiety is for the charged offense and resolve whether the defendant designed his conduct to substantially increase the fear and anxiety. *Id.* “To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied.” *Id.* at 443. The trial court should also attempt to determine “the fear or anxiety associated with the minimum conduct necessary to commit the offense.” *Id.*

The elements of felonious assault are “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An assault can occur without the commission of a battery. See *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Because the victim was battered, our review begins from “the fear or anxiety associated with the minimum conduct necessary” to commit the crime when a battery is involved.

The victim testified that defendant hit her with a closed fist and then picked up a flashlight and hit her with it multiple times. After defendant forced the victim outside, he chased her around a car. When he caught her, he again struck her. Defendant then forced the victim up the porch stairs and tried to force her to open the front door of the house. When she resisted, defendant grabbed her by the face and bit her lip. Once defendant got the victim in the house and back upstairs, he continued to hit her with his fist and the flashlight. The victim had to “beg him” to stop hitting her. Eventually defendant stopped and fled.

Defendant repeatedly beat the victim with both his fists and a flashlight, bit the victim’s lip, and forced her back into the house (a place where the assault could be continued away from public observation). Such conduct can reasonably be considered to have been designed to substantially increase her fear and anxiety. Accordingly, the trial court did not err in determining that OV 7 should be scored at 50 points. Such a score was supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

III. ALLEYNE CHALLENGE

Defendant also argues that the trial court engaged in judicial fact-finding that increased defendant's minimum sentence in violation of *Alleyne v US*, ___ US ___, 133 S Ct 2151; 186 L E 2d 314 (2013). This argument was rejected in *People v Herron*, ___ Mich App ___, ___ NW2d ___ (Docket No. 309320, issued December 12, 2013), slip op p 7:

We hold that judicial fact-finding to score Michigan's guidelines falls within the "wide discretion" accorded a sentencing judge "in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law." [*Alleyne v United States*, 570 US ___, ___ n 6; 133 S Ct 2151; 186 L Ed 2d 314 (2013)], quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163.

This Court is bound to follow *Herron*. MCR 7.215(J)(1); see also *People v Lockridge*, ___ Mich App ___, ___ NW2d ___, (Docket No. 310649) slip op at 3 (lead opinion by O'Connell, J.). Accordingly, we decline to grant defendant relief on this ground.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra